178038

TMA® TRUCK MANUFACTURERS ASSOCIATION®

1225 New York Avenue, NW – Suite 300
Washington, DC 20005-6156
Phone: 202/638-7825 • Fax: 202/737-3742

250 Bridge Street – Suite 100
Carleton Place, ON K7C 3P4
Phone: 613/253-8858 • Fax: 613/253-8859

NHTSA-02-12150-5

July 1, 2002



The Honorable Jeffrey W. Runge, M.D.
Administrator
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

**Reference: Confidential Business Information (67 Fed. Reg, 21198, April 30, 2002) [Docket No. NHTSA-2002-12150]; Notice of Proposed Rulemaking**

Dear Dr. Runge:

The Truck Manufacturers Association (TMA), whose members include all of the major North American manufacturers of medium and heavy-duty trucks (greater than 8,845 kilograms (19,500 pounds) gross vehicle weight rating) submits the following comments in response to the subject Notice of Proposed Rulemaking. TMA member companies include: **Ford Motor Company; Freightliner LLC; General Motors Corporation; International Truck and Engine Corporation; Isuzu Motors America, Inc.; Mack Trucks, Inc.; PACCAR Inc; and Volvo Trucks North America, Inc.**

As TMA noted in its comments on the Early Warning Reporting System Notice of Proposed Rulemaking, promotion of safety is a high priority among medium and heavy-duty truck manufacturers. Thus, TMA and its members support the agency's efforts to implement the TREAD Act and to require submission of data through an early warning reporting system to the extent such data are relevant in earlier identification of defective components, systems or vehicles. The Confidential Business Information NPRM under consideration, however, raises serious issues as those proposed rules would apply to information submission under the early warning reporting system.

TMA members are subject to the broadest information submission requirements under the proposed early warning reporting system. As proposed, medium and heavy-duty truck manufacturers would be required to submit information concerning the number of property damage claims, consumer complaints, warranty claims and field reports occurring during each quarterly reporting period, and to provide to NHTSA copies of certain field reports. TMA is concerned about the manner in which the agency is proposing to handle these sensitive materials. While we understand NHTSA's desire to streamline the process of evaluating these voluminous data for purposes of determining confidentiality and, if appropriate, public disclosure, TMA believes that the proposed rule goes too far, and ignores both the express language of the

TREAD Act and the potentially detrimental effects that disclosure of early warning reporting system data will have on medium and heavy-duty truck manufacturers. We address this issue, and other issues of concern to TMA members, in the discussion below.

**The TREAD Act Restricts Disclosure of Early Warning Reporting System Data, Except in Limited Circumstances**

TMA and its members strongly oppose the manner in which the agency proposes to deal with data submitted pursuant to the early warning reporting system. We believe the NPRM conflicts with Congress's intent in the TREAD Act that all early warning reporting system data be protected from disclosure, absent an affirmative determination by the agency that release of specific information will assist in carrying out 49 U.S.C. §§30117(b) and 30118 through 30121.

The NPRM acknowledges -- and purports to apply -- the special disclosure provision contained in Section 3(b) of the TREAD Act, Pub. L. 106-414 (Nov. 1, 2000). That provision, codified at 49 U.S.C. §30166(m)(4)(C), provides:

> (C) *Disclosure.* None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121.

This language provides that NHTSA cannot publicly disclose pursuant to 49 U.S.C. §30167(b) *any* information obtained pursuant to the early warning reporting requirements -- whether or not that information is otherwise deemed "confidential" by the agency -- "unless the Secretary determines the disclosure of such information will assist in carrying out [49 U.S.C.] sections 30117(b) and 30118 through 30121." Under Section 30117(b), disclosure of customer lists would be permitted to facilitate a recall; under Sections 30118 through 30121, disclosure would be permitted to allow public notice of initial and final decisions in noncompliance and defects investigations, and to make other recall-related disclosures. The statute conclusively provides that early warning information will *not* be disclosed unless NHTSA makes an *affirmative determination* that disclosure is "related to a defect or noncompliance...." 49 U.S.C. §30167(b). The NPRM is in direct conflict with this protection.

Any other construction of the TREAD Act would render the language of Section 30166(m)(4)(C) completely superfluous, in contravention of settled principles of statutory interpretation. *See, e.g., C.F. Communications Corp. v. Federal Communications Comm'n*, 128 F.3d 735, 739 (D.C. Cir. 1997) (statutes must be construed "so that no provision is rendered inoperative or superfluous, void or insignificant"); *Dunn v. Commodity Futures Trading Comm'm*, 519 U.S. 465, 472 (1997) ("... (L)egislative enactments should not be construed to render their provisions mere surplusage.").

The NPRM attempts to satisfy the TREAD Act by proposing in Section 523.23(a)(3) that "[e]arly warning information collected pursuant to regulations promulgated pursuant to section 30166(m) of title 49 . . . shall not be disclosed *under this section* [which discusses disclosure of

information for which confidential treatment has been granted], unless the Administrator determines the disclosure of the information will assist in carrying out sections 30177(b) [*sic* - should be 30117] and 30118 through 30121 of title 49." 67*Fed. Reg.* at 21205-21206 (emphasis added). By limiting application of this provision to disclosures "under this section," however, the NPRM would afford such protection to early warning information *only to the extent confidential treatment has been sought and granted.* The NPRM also misstates the governing law in the preamble:

> [E]arly warning information collected pursuant to regulations issued under 49 U.S.C. §30166(m), *if claimed or determined to be entitled to confidential treatment*, shall not be disclosed under 30167(b) unless the Administrator determines that the disclosure will assist in carrying out Sections 30117(b) and Sections 30118 through 30121.
> 67 *Fed. Reg.* at 21201 (emphasis added).

In other words, the NPRM assumes, without any authority, that only early warning reporting system data that has been determined to be "confidential" would be subject to the protections set forth in Section 30166(m)(4)(C). This is contrary to the express language of the TREAD Act, which makes no reference to a prerequisite of an agency "confidentiality" determination. Indeed, it is the TREAD statute itself which cloaks early warning reporting system information with confidentiality.

TMA, therefore, urges NHTSA not to adopt a rule that would permit disclosure of early warning reporting system information absent a specific determination that the information to be disclosed will assist in carrying out 49 U.S.C. §§ 30117(b) and 30118 - 30121, or a proper request under the Freedom of Information Act, 5 U.S.C. § 552, which affords additional procedural protections to the submitter.

**TMA Objects to the NPRM's Proposed Class Determinations**

The NPRM proposes four new class determinations, i.e., rebuttable presumptions: consumer complaints, "reports and data" related to property damage claims and warranty claims and compliance test data that "would not cause competitive harm if released." 67 *Fed. Reg.* at 21206. Three of the four new "classes" pertain to information which may be required to be submitted under the agency's proposed early warning reporting system. Thus, the consequence of the proposed class determinations is that a significant portion of the early warning reporting system data would be publicly available.

To the extent these class determinations would apply to early warning reporting system information, the agency's proposal improperly assumes that a confidentiality determination is necessary or even relevant to a decision to disclose early warning reporting system data. As discussed above, however, all early warning reporting system information is entitled to the protections afforded by 49 U.S.C. §§30166(m)(4)(C) and 30167(b), regardless of whether that information has been accorded confidential treatment by NHTSA.

TMA disagrees with the NPRM's proposal to create a presumption that customer data related to complaints, property damage claims and warranty claims are not entitled to confidential treatment. The NPRM's presumption that disclosure of this unverified and, therefore, unreliable information would not cause competitive harm if disclosed is without basis.

In addition to the harm that medium and heavy-duty truck manufacturers would suffer, release of this information would also adversely impact these manufacturers' customers, such as trucking companies and fleet owners, whose competitors would gain previously unavailable market intelligence concerning the operational state of the formers' vehicle fleets.

We acknowledge that, in general, NHTSA has historically declined to grant confidential treatment for similar data when submitted in response to information requests. However, the breadth and depth of the data to be submitted under the early warning reporting system, and the frequency of those submissions, is far greater than the data submitted in response to focused information requests. Public availability of detailed, comprehensive warranty and property damage data for each model and model year across numerous components and systems will provide significant market intelligence to competitors.

Despite these competitive harms, there would be little public benefit from disclosure of this information. The underlying claims (warranty, property damage, or other complaints) will not have been verified for accuracy, and, because of the different recordkeeping methods (such as differences in warranty systems) of the various submitters, the result of disclosure would likely be consumer confusion, and competitive harm to manufacturers and their goodwill.

NHTSA should leave its current class regime in place, and allow companies to seek confidential treatment of particular submissions on a case-by-case basis. At a minimum, however, the agency should explicitly limit the application of any proposed class determinations to non-early warning reporting system submissions.

**Other Class Determinations**

The NPRM asks for comment on whether the agency should adopt class determinations relating to information on incidents involving injuries and deaths, and copies of field reports. For the reasons discussed above with respect to property damage, warranty claims and consumer complaints, TMA also urges the agency not to adopt class determinations concerning these categories of information. The proposed early warning reporting system would require submission of information concerning deaths and injuries that allegedly related to a manufacturer's product. Under the existing early warning reporting system proposal, submissions are triggered by claims and "notices" of mere allegations. Companies would be placed at a competitive disadvantage if these unverified allegations were regularly made public, with no parallel mechanism for refuting those allegations.

TMA also objects to any routine disclosure of field reports. In addition to the competitive harm that medium and heavy-duty truck manufacturers will likely suffer if field reports, which by their very nature contain unverified, anecdotal information, are disclosed, the customers of those

manufacturers, e.g., fleet owners and trucking companies, would also be harmed. The likely competitive harm and unwarranted damage to a company's goodwill from these disclosures is obvious.

Medium and heavy-duty truck manufacturers are also concerned about the future quality of field reports in an atmosphere where such reports will regularly be made public. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court held that information should not be released if disclosure of that information would result in the diminution of the reliability or quality of that information. *See also Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 878 (D.C. Cir. 1992) (citing *Washington Post v. H.H.S.*, 690 F.2d at 268-69). To be sure, a policy of disclosing field reports will likely lead to a reduction in the frequency and quality of such reports, and therefore, the quality of the information that medium and heavy-duty truck manufacturers receive as individuals/fleets begin to consider the risks of disclosure of information they provide in these reports.

**Other Issues With Respect to Class Determinations**

If the agency decides to adopt one or more class determinations in its final rule, TMA urges NHTSA to clarify that the class determinations will not apply to information submitted voluntarily. As NHTSA recognizes, when information is submitted voluntarily, the submitter is entitled to protection as long as the information is of the type that the submitter does not customarily disclose to the public. *Critical Mass Energy Project v. NRC*, 975 F.2d at 879. The "competitive harm" standard, which governs the class determinations, does not apply in such instances.

The NPRM's proposed class determinations pertain to all "reports and data" required to be submitted to the agency related to property damage claims, warranty claims and consumer complaints. We note that under the early warning reporting system proposed rule, companies initially would be required to submit only numbers. It is not clear, therefore, whether the agency intended the class determinations to be drafted as broadly as they have been. In adopting its final rule, TMA requests that the agency consider, and exclude from the class determinations, the other types of information that may be "related" to property damage claims, warranty claims and consumer complaints, such as claim amounts.

**The Proposed Three-Part Submission of Confidentiality Claims**

In the NPRM preamble (67 *Fed. Reg.* at 21199), NHTSA proposes "to minimize the burden to submitters" by increasing the number of confidentiality claim submissions from two to three. TMA believes that the proposed, new "third version" adds nothing to the agency's review process, while at the same time unnecessarily increases the burdens on submitters.

Proposed §512.6 would build on the agency's current practice of submitting a complete copy (with annotations as to confidential information) to Chief Counsel and a public access, redacted copy to the requesting or intended agency office by requiring submitters to file a third copy,

containing only "confidential" information, in addition to "any non-confidential information necessary [for] the agency to assess the ... claim...." Section 512.6(a)(4).

In the view of TMA's membership, the current two-part process for submission has achieved satisfactory results. The mere added convenience to NHTSA, whether of a third, fourth, fifth, etc. variation of these submissions, is, we believe, outweighed by the added burden on submitters. This burden is further exacerbated by the proposed requirement that a submitter be saddled with the obligation to anticipate the agency's needs by also submitting "any non-confidential information necessary to enable the agency to assess the submitter's claim for confidential treatment." The proposed new requirement thus launches the submitter into the uncertain world of "guestimates" and conjecture as to what else NHTSA needs to adjudge the confidentiality claim. TMA submits that the additional layer of the "third version" submittal proposed here is an unnecessary exercise, and that the Chief Counsel's Office has, through access to a complete copy of the submission, all the information it needs to make the requisite confidentiality determinations. Again, TMA believes that the current procedure works well, and that extra layers of submissions will only complicate the process and unnecessarily burden submitters.

**Duty to Amend**

The NPRM restates and expands on the existing duty to amend information submitted in support of a request for confidential treatment. Under the existing rule, a submitter has a duty to amend a submission "if the submitter obtains information upon the basis of which the submitter knows that the supporting information was incorrect when provided, or that the supporting information, though correct when provided, is no longer correct and the circumstances are such that a failure to amend the supporting information is in substance a knowing concealment." 49 C.F.R. §512.4(i). The NPRM proposes to significantly alter this duty by requiring amendment "whenever the submitter knows or becomes aware that the information was incorrect at the time it was provided to NHTSA, or that the information, although correct when provided to NHTSA, is no longer correct." 67 *Fed. Reg.* at 21204 (proposed §512.10). The proposed omission of the reference to a "knowing concealment" is a significant substantive change to the rule, and would effectively create a new burden for submitters constantly to monitor submissions in order to avoid civil penalties.

TMA does not believe that the existing rule requires modification in this respect. In the event NHTSA decides to change this aspect of the rule, however, TMA urges the agency to apply the duty to amend only to submissions relating to <u>open</u> investigations or rulemakings. This would significantly reduce the burden on companies, while ensuring that the public has the information to which it is entitled at the most relevant time.

**Redaction of Personal Information**

Proposed Section 512.5(c) states: "It is requested that any information of a personal nature . . . also be removed from the redacted version of the submitted materials." Although phrased as a "request" rather than a "requirement," TMA believes that the burden of reviewing and redacting such information should properly fall on NHTSA, and not the manufacturers submitting the information.

* * *

TMA appreciates the opportunity to provide comments on the Confidential Business Information Notice of Proposed Rulemaking. TMA staff is available to provide additional relevant information upon request.

Sincerely,

William A. Leasure, Jr.
President